But the same facility would require $1000 per subscriber for a 10,000 line company, and $4000 per subscriber for a 2500 line company. Companies of this size lack the economies of scale to make the $10 million investment feasible. The effect of the terms of the infrastructure sharing arrangement should be such that the cost to a 10,000 line qualifying carrier to obtain the use of a $10 million dollar facility from a 10 million line company is similar to that of the providing company - around $1 per customer.[11] Understood this way, the "fully benefit" language yields a full recovery of costs for the providing carrier, and eliminates the burden on the QLEC's subscribers caused by its lack of economies of scale or scope.

This approach to the "fully benefit" requirement best addresses Congressional intent: to enable subscribers of companies lacking economies of scale and scope to obtain services at affordable rates by sharing in the economies of scale and scope of other LECs. This approach also promotes economic efficiency. If a QLEC can obtain a particular facility or function on its own on terms which yield a cost to subscribers equal to or lower than that of obtaining the facility or function from a PLEC, it will make the economically efficient choice to invest in its own facilities. Finally, since the terms and conditions obtained by the qualifying LEC are negotiated with reference to the actual costs of the providing LEC, infrastructure sharing agreements established under this approach are unlikely to yield results which are "economically unreasonable" or "contrary to the public interest," and therefore precluded by Section 259(b)(1).

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[11]The actual cost to the QLEC may vary slightly, depending on the particular terms of the negotiated arrangement, and/or unusual cost factors. The goal is not mathematical precision, but rather to place the QLEC on "fully" equal footing with the providing LEC with respect to the costs which must be passed on to consumers.

C. The Commission Must Confirm That Providing LECs Are Not To Be Treated As Common Carriers Under Any Circumstances

Section 259(b)(3) of the Act provides in clear and unambiguous terms that the regulations prescribed by the Commission pursuant to this section shall ensure that providing LECs will not be treated by the Commission or any State as a common carrier for hire or as offering common carriers services with respect to any infrastructure made available. 47 U.S.C. § 259(b)(3). The Congressional language could not be more clear - providing LECs are to be treated as private carriers and need not provide the same capabilities on the same terms to all QLECs.

The Notice seeks comment as to whether the requirement in Section 259(a) that PLECs provide infrastructure sharing to any requesting carrier reflects an inherent non-discrimination principle, and whether the Commission can and should require incumbent LECs to make such arrangements available to similarly situated qualifying carriers on the same terms. Notice, para. 22. Such a reading of Section 259(a) is inconsistent with Section 259(b)(3) and should be rejected. LECs are not, by virtue of Section 259(a), rendered common carriers or subjected to any obligations to replicate precise arrangements for any other entity, whether or not the other entity is a qualifying carrier. Section 259(a) only addresses with whom PLECs must deal - it says nothing about the terms and conditions of infrastructure sharing arrangements. And Section 259(b)(3) makes clear that providing carriers are to be treated as private contracting parties - each infrastructure sharing arrangement is unique and stands on its own.

The Notice expresses concern that qualifying carriers could "potentially" receive unequal treatment which could affect the ability of the qualifying carriers to compete with each other. Notice, para. 22. Nothing in Section 259 indicates that Congress expected QLECs to compete with each other -- 259 addresses universal service, not competition. In addition, if the terms and conditions of the arrangement comply with Section 259(b)(4) and enable each qualifying carrier to "fully benefit," there is unlikely to be any unjust or unreasonable effect on the ability of qualifying carriers to compete with each other. The Commission's tortured reading of the statute is unnecessary to serve any competitive goal.

The Commission should instead use this proceeding to adopt rules and guidelines which further the intent of Section 259(b)(3), not undermine it. In particular, the Commission should be careful to note that simply because agreements are publicly filed, as required by Section 259(b)(7), they are not "tariffs," nor does such public filing constitute a "holding out to the public" of the terms and conditions of an infrastructure sharing arrangement. See, e.g., NARUC v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) ("NARUC II"); Southwestern Bell, et. al. v. FCC, 19 F.3d 1475, 1483-84 (D.C. Cir. 1994) ("Dark Fiber Appeal"). Also, the statute expressly provides unambiguous authority to ensure that PLECs are not to be treated by any State as a common carrier. Consequently, the Commission should note that any state regulations which either on their face or as applied treat sharing LECs as common carriers are also unlawful.

D. The Commission Should Permit Carriers To Determine When Arrangements Are Not Required or Must Be Terminated Based on Competition In the Providing LEC's Service Area By the Qualifying LEC

Section 259(b)(6) establishes that providing LECs are not required to engage in any infrastructure sharing requirement for any services or access which are to be provided by the qualifying carrier in such local exchange carrier's telephone exchange area. USTA agrees with the Notice that this provision means that QLECs may not use shared facilities to provide competitively any telecommunications or information service offered by the providing incumbent LEC directly to consumers, or any access service offered to other providers which in turn offer services to consumers. Notice, para. 26. We also agree that a providing LEC is not required to share "services or access," Id., in part because infrastructure sharing does not contemplate "sharing" of services. Unbundled network elements that may be used to provide services on a competitive basis are, as noted, available under Section 251.

The Notice also correctly notes that a providing carrier may terminate an agreement in the event it discovers that the qualifying carrier is offering or providing service in the providing LEC's service area. Notice, para. 27. There is no basis for assessing a burden of proof, as suggested by the Notice. Id. The question of which carrier has the burden of proof will be addressed by the contract, or by the dispute process. Normally, a carrier bringing a dispute must present a prima facie case; similarly, a prima facie case must also be rebutted by some showing that the termination was justifiable.

There is no need for pre-emptive interference by the Commission in the relationship between the parties in order to prevent service disruptions. QLECs are the providers of services which could be jeopardized by termination; thus they have an incentive to not risk termination because of a decision to compete against the providing LEC. QLECs have ample incentives to maintain good communications with providing carriers. Similarly, PLECs are unlikely to place themselves cavalierly in the position of answering for a service outage. It would be reasonable to require that service cannot be cut off without at least sixty days notice; we expect that many contracts would include some form of this provision even absent regulation.

E. The Commission Need Not Adopt Detailed Rules for Purposes of the Information Disclosure Requirements of Section 259

The Notice seeks comment on the extent of overlap between Section 259© obligations to provide "timely information" to QLECs obtaining infrastructure sharing, and other network disclosure rules. Notice, para. 30. Section 251(c)(5) requires public disclosure of network changes that affect interconnection with regard to common carrier services. See 47 U.S.C. § 251(c)(5). Section 259 arrangements, however, are private carriage, and disclosure under Section 259(c) is required only to the LECs directly affected by the network change. See 47 U.S.C. §§ 259(b)(3); 259(c). To the extent that public notice of network changes is required to permit QLECs to determine whether to seek to acquire a particular facility or function under Section 259, that goal is accomplished by the disclosure requirements of Section 251(c)(5).

Unlike the provisions of Section 259(b), Congress did not contemplate that the Commission would issue regulations governing information disclosure. Compare 47 U.S.C. § 259(b) (instructing the Commission to prescribe regulations) with 47 U.S.C. § 259© (network disclosure obligations included in a separate section with no such instructions given). Because of the limited scope of Section 259(c) network disclosure, it is expected that parties will negotiate terms concerning the content and frequency of "timely information" required under this section.

The Notice expresses concern regarding safeguards to ensure that competitively sensitive, proprietary or trade secret information is protected. Notice, para. 36. Generally, this type of information will not pose an issue since this information is not required to be shared. Even so, the Commission should not preclude the use of non-disclosure agreements. Such agreements would further the purpose of the statute by permitting providing carriers to provide information to QLECs which would assist those QLECs in fulfilling their universal service obligations without harm to the providing company.

CONCLUSION

The Commission should adopt regulations to implement Section 259 of the Act consistent with the discussion above.

Respectfully submitted,

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December 20, 1996

CERTIFICATE OF SERVICE

I, Carl McFadgion, do certify that on December 20, 1996 copies of the Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the person on the attached service list.

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